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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 REALD SPARK, LLC,

11 Plaintiff,

12 v.

13 MICROSOFT CORPORATION,

14 Defendant.

15 Case No. 2:22-cv-00942-TL

16 **DEFENDANT'S MOTION TO COMPEL
DISCOVERY RESPONSE**

17 **NOTE ON MOTION CALENDAR:
March 24, 2023**

18 **ORAL ARGUMENT REQUESTED**

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26 DEFENDANT'S MOTION TO COMPEL
(Case No. 2:22-cv-00942-TL)

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1 Defendant Microsoft Corporation moves pursuant to Federal Rule 37(a) and LCR 37 for
 2 an order compelling specific identification of the purported trade secrets that Plaintiff RealD
 3 Spark, LLC alleges were misappropriated. Microsoft further seeks a Protective Order pursuant to
 4 Federal Rule 26(c) and LCR 26(c)(1) deferring discovery regarding the implementation of
 5 Microsoft's accused technology until RealD sufficiently identifies its purported trade secrets.

6 **I. INTRODUCTION AND OVERVIEW OF NEED FOR IMMEDIATE RELIEF**

7 RealD's Complaint accused Microsoft of misappropriating certain trade secrets that were
 8 described in a non-limiting and, as RealD phrased it—"high-level"—fashion. Dkt. No. 1 ¶ 18. At
 9 the earliest opportunity, Microsoft propounded an interrogatory seeking a particularized
 10 description of each purported trade secret alleged to be misappropriated. Ex. 1, Defendant's First
 11 Set of Interrogatories to Plaintiff RealD Spark, LLC.¹ RealD's response regurgitates nearly
 12 *verbatim* the same "high-level groups" from its Complaint:

- 13 1. Image recognition algorithms for different types of faces, lighting, eye color, and
 14 eyeglasses;
- 15 2. Datasets to support SocialEyes' image recognition methods;
- 16 3. Know-how resulting from RealD's lengthy and costly R&D process used to develop
 17 SocialEyes and its corresponding datasets;
- 18 4. Negative know-how that resulted from RealD's lengthy and costly R&D process that was
 19 used to develop SocialEyes and its corresponding datasets; and
- 20 5. Source code that contained and implemented the aforementioned trade secrets.

21 See Ex. 2, RealD's First Supplemental Objections and Responses to Microsoft's First Set of
 22 Interrogatories (No. 1) dated January 31, 2023.

23 "A true trade secret plaintiff ought to be able to identify, up front, and with specificity the
 24 particulars of the trade secrets without any discovery." *Jobscience, Inc. v. CVPartners, Inc.*, No.
 25 13-cv-4519, 2014 WL 852477, at *5 (N.D. Cal. Feb. 28, 2014). Yet, after numerous meet-and-
 26 confers, RealD refuses to identify its claimed trade secrets with any additional precision or
 27 particularity. As a result, Microsoft is denied a meaningful opportunity to prepare its defense. The

¹ Exhibits are attached to the Declaration of Natalie A. Bennett filed herewith.

1 generic “categories” provided in the Complaint, which is publicly available, do not provide
 2 Microsoft with information as to what specifically RealD supposedly protected as trade secrets as
 3 opposed to generally available knowledge in this technology. These generic “categories” further
 4 fail to distinguish between information alleged to have been maintained in secret and information
 5 that RealD *disclosed to the public* in RealD’s own patent asserted against Microsoft.

6 These vague “categories” will be of no help to the Court in helping the parties navigate
 7 discovery. Instead of serving a notice function, these vague categories pose questions that will
 8 remain unanswerable until RealD provides a detailed description of the material that it treated as
 9 a trade secret, and which Microsoft is alleged to have misappropriated. For example:

- 10 • How will the Court and Microsoft know which of the many image recognition algorithms
 (many of them publicly described) RealD claims as its own trade secrets?
- 11 • Which datasets is Microsoft alleged to have misappropriated from RealD?
- 12 • Even if Microsoft had access to RealD’s source code, has RealD treated every line of it as a
 trade secret, such that an incidental appearance of a few similar coding techniques—no
 matter how conventional or well known—would entitle RealD to recovery?

14 RealD offers no specificity and certainly no clarity in hiding behind almost *three thousand* pages
 15 of recently produced documents allegedly containing further details of RealD’s categories of trade
 16 secrets. The strategy of “our purported trade secrets must be in there somewhere” does not satisfy
 17 RealD’s disclosure obligation. RealD claims to have developed the technological equivalent of a
 18 “secret sauce” entitled to trade secret protection. Surely RealD can describe what that technical
 19 solution is, in specific words, rather than expecting Microsoft or the Court to divine the alleged
 20 trade secrets after sorting through thousands of pages of documents.

21 If RealD cannot articulate the alleged trade secrets with particularity, there is no safe harbor
 22 that permits hedging as to the scope of its allegations. Courts recognize use of the discovery
 23 process to articulate a post-hoc misappropriation theory as classic gamesmanship. *Jobscience*,
 24 2014 WL 852477, at *5 (“Experience has shown that it is easy to allege theft of trade secrets with
 25 vagueness, then take discovery into the defendants’ files, and then cleverly specify whatever
 26 happens to be there as having been trade secrets stolen from plaintiff.”).

1 Microsoft therefore moves the Court to compel RealD to adhere to the minimum standard
 2 for trade secret identification: to “describe the subject matter of the trade secret with *sufficient*
 3 *particularity* to separate it from matters of general knowledge in the trade or of special knowledge
 4 of those persons . . . skilled in the trade.” *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d
 5 653, 658 (9th Cir. 2020) (emphasis in original) (internal quotation marks omitted) (quoting *Imax*
 6 *Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164 (9th Cir. 1998)). Indeed, “identifying trade
 7 secrets with sufficient particularity is important because defendants need concrete identification to
 8 prepare a rebuttal.” *Id.* (internal citation omitted). Discovery as to sensitive technical issues should
 9 also be deferred until RealD provides the concrete details of what information it alleges is a trade
 10 secret and was allegedly misappropriated by Microsoft.

11 **II. PROCEDURAL BACKGROUND**

12 RealD’s Complaint asserts—among other claims—trade secret misappropriation under
 13 both the Defend Trade Secrets Act, 18 U.S.C. §§ 1836, *et seq.* and Washington State Uniform
 14 Trade Secret Act, RCW §§ 19.108.010, *et seq.* *See* Dkt. No. 1. The Complaint describes RealD’s
 15 attempt to license its video conferencing imaging technology, “SocialEyes,” to Microsoft, and
 16 alleges that RealD, pursuant to an NDA, shared unspecified “confidential information” and “trade
 17 secrets” regarding SocialEyes with Microsoft, including the installation of SocialEyes
 18 demonstration software on a Surface Pro 4 tablet. *Id.* ¶¶ 14–22. RealD alleges that Microsoft has
 19 misappropriated RealD’s trade secrets by “incorporating SocialEyes into Microsoft’s Surface
 20 product line,” hiring ex-RealD employees who worked on SocialEyes, and filing a patent
 21 application “directed to RealD’s SocialEyes technology.” *Id.* ¶¶ 27–28.

22 Because Microsoft did not incorporate the SocialEyes product into any of its offerings, and
 23 it did not have access to RealD’s source code, Microsoft served a targeted interrogatory to RealD
 24 to ascertain what specific trade secrets RealD contends are at issue in this case. Ex. 1 at 5.
 25 Microsoft asked RealD: “[d]escribe with particularity each and every alleged Trade Secret that
 26 You contend Microsoft misappropriated, including, but not limited to the . . . representative

1 categories of alleged trade secrets identified in ¶¶ 18, 39–74 of Your Complaint.” *Id.*

2 RealD’s initial response to Interrogatory No. 1 on January 3, 2023 merely referred back to
 3 the supposed trade secret “categories” in the Complaint. *See* Ex. 3, RealD’s Objections and
 4 Responses to Microsoft’s First Set of Interrogatories (No. 1) at 3–5. On January 17, 2023, the
 5 parties first met and conferred on RealD’s deficient response. Bennett Decl., ¶ 2. RealD informed
 6 Microsoft that it would be supplementing its response to Interrogatory No. 1 and planned to
 7 produce documents sufficient to identify the alleged trade secrets. *Id.* RealD maintained that the
 8 supplemental response and document production would resolve Microsoft’s concerns. *Id.* ¶ 3.

9 However, RealD’s substantive supplemental response is identical to its initial response,
 10 regurgitating its Complaint. *See* Ex. 2 at 5–7. The supplemental response referred Microsoft to
 11 thousands of pages of documents as well as source code under Fed. R. Civ. P. 33(d). The only
 12 additional narrative provided in the supplemental response is equally vague:

13 . . . For example, the identified documents include numerous images that RealD
 14 used to evaluate how its algorithms responded to a multitude of conditions, such as
 15 eye gazes in different directions, different facial features, different skin
 16 colors/tones, a subject wearing glasses, or a subject with some or all of its eye
 17 region obscured. The identified documents also confirm that RealD accumulated
 18 and analyzed large quantities of data in order to refine its algorithms so that the
 19 algorithms appropriately adapted to and accounted for conditions such as eye gazes
 20 in different directions, different facial features, different skin colors/tones, a subject
 21 wearing glasses, or a subject with some or all of its eye region obscured.

22 *Id.* at 6.

23 The parties met and conferred a second time regarding RealD’s deficient supplemental
 24 interrogatory response on February 14, 2023. Bennett Decl. ¶ 5. The parties remain at an impasse
 25 as to whether RealD sufficiently identified the alleged trade secrets as well as whether RealD is
 26 entitled to rely on Rule 33(d). *Id.* ¶ 6.

23 III. APPLICABLE LAW

24 “[A] plaintiff seeking relief for trade secret misappropriation must identify the trade secret
 25 ‘with sufficient particularity . . . to permit the defendant to ascertain at least the boundaries within
 26 which the secret lies.’” *Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F.Supp.3d 1169, 1178

1 (W.D. Wash. 2019) (internal citation omitted). The burden is on the plaintiff to identify its trade
 2 secrets with “sufficient specificity.” *telSPACE, LLC v. Coast to Coast Cellular, Inc.*, No. 13-cv-
 3 01477, 2014 WL 4364851, at *5 (W.D. Wash. Sept. 3, 2014); *DropzoneMS, LLC v. Cockayne*,
 4 No. 16-cv-02348, 2019 WL 7630788, at *11 (D. Or. Sept. 12, 2019) (“The Ninth Circuit’s decision
 5 in *Imax* illustrates that it is the plaintiff’s burden to describe the trade secret with precision.”); *see*
 6 *also MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 522 (9th Cir. 1993) (trade secret plaintiff
 7 “must identify the trade secrets and carry the burden of showing that they exist”). A plaintiff has
 8 the burden of describing “the subject matter of the trade secret with sufficient particularity to
 9 separate it from matters of general knowledge in the trade or of special persons who are skilled in
 10 the trade, and to permit the defendant to ascertain at least the boundaries [within] which the secret
 11 lies.” *Sennco Solutions, Inc. v. Mobile Techs. Inc.*, No. 20-cv-1426, 2020 WL 8836070, at *2 (D.
 12 Or. Dec. 21, 2020) (citing *Space Data Corp. v. X*, No. 16-cv-3260, 2017 WL 5013363, at *2 (N.D.
 13 Cal. Feb. 16, 2017)).

14 **IV. ARGUMENT**

15 **A. RealD Should Be Compelled To Provide An Interrogatory Response
 Identifying Its Alleged Trade Secrets With Particularity**

16 RealD’s responses to Interrogatory No. 1 do not “[d]escribe with particularity each and
 17 every alleged Trade Secret that [RealD] contend[s] Microsoft misappropriated.” The overbroad
 18 nature of the response is embodied by RealD’s reliance on the catch-all phrase “at least the
 19 following trade secrets.” *See, e.g., StonCor Grp., Inc. v. Campton*, No. 05-cv-1225, 2006 WL
 20 314336, at *2 (W.D. Wash. Feb. 7, 2006) (requiring supplementation of interrogatory response
 21 identifying trade secrets due to inclusion of phrase “among other things”); *I-Flow Corp. v. Apex*
 22 *Med. Techs., Inc.*, No. 07-cv-1200, 2008 WL 11342247, at *3 (S.D. Cal. Oct. 10, 2008) (requiring
 23 same where response used phrases “includes” and “including” because “[c]hoice of words is
 24 crucial when . . . answering an interrogatory”); *CleanFish, LLC v. Sims*, No. 19-cv-3663, 2020
 25 WL 4732192, at *3–4 (N.D. Cal. Aug. 14, 2020) (rejecting trade secret disclosures that are “broad
 26

1 categories of information” relying on hedging phrases such as “including, but not limited to”).
 2 RealD relies on *generalities* rather than precise boundaries so as to maintain that *any information*
 3 previously shared with Microsoft is a trade secret when its burden is to identify only information
 4 that is worthy of trade secret protection.

5 For the reasons set forth below, this Court should compel RealD to provide a compliant
 6 response. This Court should further defer discovery into Microsoft’s accused and highly sensitive
 7 technical details until RealD properly identifies the contours of the alleged trade secrets.

8 **1. RealD’s Sweeping Identification of Alleged “Categories” of Trade
 9 Secrets Fails to Provide Reasonable Notice**

10 RealD fails to identify a single actual trade secret within any “high-level” category set forth
 11 in its Complaint and two attempts at an interrogatory response. RealD’s own description of the
 12 “categories” of trade secrets are not tailored and are, in fact, applicable to any entity providing eye
 13 gaze correction solutions. Such sweeping “categories” of alleged trade secrets fail to satisfy the
 14 well-accepted standard of (1) putting a defendant on notice of the nature of plaintiff’s claims and
 15 (b) enabling a defendant to determine the relevance of any requested discovery concerning its trade
 16 secrets. *See Sennco*, 2020 WL 8836070, at *2.

17 For example, category #1 broadly covers “image recognition algorithms for different types
 18 of faces, lighting, eye color, and eyeglasses.” RealD Supp. ROG 1 Response at 5 (emphasis
 19 added). Notwithstanding that this non-limiting description could cover any algorithm, RealD’s
 20 supplemental response confirms that RealD is aware of the algorithms at issue. As highlighted
 21 below, RealD references “its algorithms,” but RealD does not disclose what those algorithms are:

22 [T]he identified documents include numerous images that RealD used to evaluate how its algorithms responded to a multitude of conditions...”

23 “The identified documents also confirm that RealD accumulated and analyzed
 24 large quantities of data in order to refine its algorithms...

25 RealD’s response fails to identify the *actual* algorithms that—in its own words—RealD evaluated
 26 and refined. By merely “point[ing] to general categories in which it alleges trade secret

1 misappropriation, [RealD] fails to sufficiently identify its alleged trade secrets because it does not
 2 clarify what specific components” actually constitute the trade secrets. *Olson Kundig, Inc. v. 12th*
 3 *Ave. Iron, Inc.*, No. 22-cv-825, 2022 WL 4534422, at *8 (W.D. Wash. Sept. 28, 2022) (internal
 4 quotations omitted); *CleanFish*, 2020 WL 4732192, at *3 (finding that Plaintiff’s “broad
 5 categories of information” are “too high level to give the Court or Defendants notice of the
 6 boundaries of the alleged trade secrets.”). As a result, *any* algorithm that RealD’s expert identifies
 7 in Microsoft image correction tools can be made to fit this definition in a classic *post hoc* fashion.

8 Similarly, Category #2 relates to “datasets to support SocialEyes’ image recognition
 9 methods.” RealD Supp. ROG 1 Response at 5. Not only is this description overbroad, but RealD
 10 again confirms that it knows which data sets are at issue. *Id.* at 6 (“An examination of those
 11 documents confirms RealD’s compilation of and reliance on data sets.”). However, RealD again
 12 fails to specifically identify the data sets it is relying on as a trade secret.

13 Categories #3 and #4 are even more problematic, as they relate to some unspecified know-
 14 how and negative know-how “resulting from RealD’s lengthy and costly R&D process.” Both
 15 “know-how” (i.e., knowledge as to *what works*) and “negative know-how” (i.e., knowledge about
 16 *what does not work* in a particular field) generally presuppose some proprietary or secret nature of
 17 that knowledge outside the public domain. As such, any eye gaze technology developer
 18 imaginable (and this includes Microsoft with its technology development predating RealD) would
 19 generate its own know-how and negative know-how in this field. RealD’s description fails to
 20 separate what specific positive and negative knowledge it supposedly developed on its own.

21 Lastly, category #5 is “source code that contained and implemented the aforementioned
 22 trade secrets.” This definition is, of course, circular and deficient for all the reasons above. RealD
 23 must provide notice to Microsoft as to precisely which portions of the code are at issue but has
 24 failed to do so. *DropzoneMS*, 2019 WL 7630788, at *11 (“Here, plaintiff has failed to identify
 25 such ‘specific key aspects’ of its source code”); *Keywords, LLC v. Internet Shopping Enters., Inc.*,
 26 No. 05-cv-2488, 2005 WL 8156440, at *17 (C.D. Cal. June 29, 2005) (plaintiff “failed to identify

1 what portions of the source codes constitute[d] trade secrets, and the court thus [could not]
 2 determine whether [the alleged trade secrets] meet the UTSA’s definition of a trade secret”). It is
 3 true that RealD has produced its source code, but no amount of inspection of that code by Microsoft
 4 will answer the question that only RealD can answer: which parts of the code (filenames, functions,
 5 APIs, database calls, etc.) RealD itself protects as its trade secrets.

6 Only once RealD describes and identifies the universe of trade secrets at issue in this case
 7 can Microsoft examine whether the material is, in fact, entitled to trade secret protection and, if
 8 so, demonstrate that it did not misappropriate any of that material. Accordingly, the Court should
 9 order RealD to describe the scope of the alleged trade secrets with sufficient particularity to allow
 10 meaningful discovery to ensue.

11 **2. RealD’s Identification of Alleged Trade Secrets is Deficient Because It
 12 Encompasses Publicly Known Eye Gaze Solutions**

13 RealD’s five categories of purported trade secrets make no distinction between what is
 14 publicly known and what RealD kept secret. The overbroad “categories” of alleged trade secrets
 15 would encompass eye gaze correction technology disclosed in publicly available patents and
 16 publications that could not possibly constitute trade secrets. These broad descriptions are
 17 “indistinguishable from matters of general knowledge within the parties’ industry” and it would
 18 be “impossible to ascertain any boundaries within which the secret lies, let alone conduct an item-
 19 by-item determination of what is and is not protectable.” *CleanFish*, 2020 WL 4732192, at *4
 (internal citations and quotation marks omitted).

20 For example, RealD’s categories of purported trade secrets would seemingly encompass:
 21 any algorithm (#1), any data set (#2), and any know-how/negative know-how (#3, #4). These
 22 categories of purported trade secrets would allow RealD to argue that virtually any eye gaze
 23 correction technology in existence falls within its trade secret protection, even technology that is
 24 publicly disclosed and therefore could not possibly be a trade secret. This not only violates
 25 common sense, but also prejudices Microsoft’s ability to prepare its defenses and requires
 26

1 Microsoft to turn over highly confidential information regarding its accused technology prior to
 2 RealD properly identifying the contours of the alleged trade secrets.

3 RealD’s generic descriptions lay bare the inherent tensions arising when the allegedly
 4 misappropriated technology is also subject to patent protection, as is the case here. It is axiomatic
 5 that “[a] trade secret is secret. A patent is not. That which is disclosed in a patent cannot be a
 6 trade secret.” *Atl. Rsch. Mktg. Sys. v. Troy*, 659 F.3d 1345, 1357 (Fed. Cir. 2011). RealD blurs
 7 those clear distinctions in claiming trade secret protection over broad categories of publicly known
 8 information and eye gaze correction solutions that are abundant in prior art patents and
 9 publications—including RealD’s patent. RealD’s interrogatory response fails to articulate
 10 “something more” than what is disclosed in a patent. *Id.*; *see also Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 670 (Fed. Cir. 1988) (“Those patents issued [on] a date before [the] disclosure to [defendant], so that the information ‘misappropriated’ could not possibly be a trade secret.”);
Island Intell. Prop., LLC v. StoneCastle Asset Mgmt. LLC, 463 F.Supp.3d 490, 500 n.3 (S.D.N.Y. 2020) (“[p]ublication in a patent destroys the trade secret”).

15 RealD’s purported “categories” of trade secrets are coextensive with patent disclosures in
 16 the field of eye gaze correction. In particular, RealD’s first category of purported trade secrets,
 17 “image recognition algorithms,” have been around for decades:

- 18 • A 1995 U.S. patent that discloses “a flowchart of a **face-recognition algorithm**” and
 19 references numerous other “[a]lgorithms [] which are not specifically image processing or
 fuzzy logic related but may be **used for face recognition** or the recognition of objects.” This
 20 patent also references even earlier patents that disclose image recognition algorithms.²
- 21 • A 2007 Korean patent titled *System and method for face recognition* that discloses and
 22 claims: “[A] way to **recognize faces** in an image, a) recording a plurality of images each
 23 having an object to be recognized b) **Apply an image classification algorithm** that measures
 24 the similarity of two images and makes a judgment about their identity...”.³

25
 26 RealD cannot distinguish between the inventions disclosed in these aged patents and its alleged
 “trade secrets.” RealD should be ordered to identify with specificity how its purported “image

² See Ex. 4.

³ See Ex. 5.

1 recognition algorithm” is different from the numerous facial recognition algorithms that are known
 2 and publicly disclosed.

3 Likewise, RealD does not claim that it was the first entity to use “datasets” in eye gaze
 4 correction training (and indeed it was not). Below are exemplary descriptions of public
 5 information that fall within RealD’s high-level “categories.” Because the RealD disclosures are
 6 coextensive with public information, these disclosures cannot as a matter of law give rise to
 7 allegations of misappropriation against Microsoft.

- 8 • **RealD Category of “image recognition algorithms”** encompasses RealD’s asserted Patent,
 U.S. No. 10,740,985 (“the ‘985 Patent”). Ex. 6. In the specification, RealD publicly
 9 discloses steps that may be performed using image recognition algorithms, including
 techniques for “detecting the presence of the head.” *Id.* at col. 6 ll. 40–51.
- 10 • **RealD Category of “Datasets to support SocialEyes’ image recognition methods”** is also
 disclosed in RealD’s ‘985 Patent (“The method comprises a step S100 of receiving training
 11 data 100. [] The training data 100 comprises a set of input patches.”). *Id.* at col. 7 ll. 32–38.
- 12 • **RealD Category of Know-how and Negative Know-How Related to “Corresponding
 Datasets”** is found in prior art from 2015 and 2016 respectively that Microsoft relied on in
 13 its invalidity contentions that discloses “datasets” for the same eye gaze features. *See* Ex. 7,
 14 MSFT_00001393–1401 (titled “Learning to look up: Realtime monocular gaze correction
 using machine learning,” and explaining in June 2015 that “*suitable datasets have emerged
 over the recent years with the gaze tracking application in mind*. In our current
 15 implementation, we draw training samples from the *publicly available Columbia Gaze
 dataset*” and then disclosing an implementation dataset referred to as the “Skoltech dataset”)
 16 (emphasis added); Ex. 8, MSFT_00001333-1350 (titled “Deepwarp: Photorealistic image
 17 resynthesis for gaze manipulation” and discussing in September 2016 the topics of discussing
 “Data Preparation,” “Dataset,” and Quantitative Evaluation models for the data).

18 Because RealD has not clarified “which aspects of its technology and other information are part
 19 of patents and pending patent applications, if any, and which are secret,” further disclosure is
 20 needed. *Space Data*, 2017 WL 5013363, at *2. The Court should compel RealD to distinguish its
 21 allegations of alleged trade secrets from the known prior art relating to eye gaze correction. *See*
 22 *Top Agent Network, Inc. v. Zillow, Inc.*, No. 14-cv-4769, 2015 WL 7709655, at *5 (N.D. Cal. Apr.
 23 13, 2015) (requiring plaintiff “to distinguish the allegedly shared trade secrets from non-trade
 24 secret information”).

25 **3. RealD’s Reliance on Rule 33(d) is Improper and Does Not Provide
 Adequate Notice as to What is Claimed to be Misappropriated**

26 RealD’s interrogatory response employs Rule 33(d) to direct Microsoft towards nearly

3,000 pages of material and an untold amount of source code without any further specificity as to where the alleged trade secrets are located within those vast swaths of discovery. This approach contravenes the well-established proposition that “[i]t is inadequate for plaintiffs to cite and incorporate by reference hundreds of documents that purportedly reference or reflect the trade secret information.” *InteliClear*, 978 F.3d at 658 (internal quotations and citation omitted). Recently, a court in this District found a Rule 33(d) response insufficient where the plaintiff pointed to more than 7,000 pages of material that purportedly contained the trade secrets at issue. *Zunum Aero, Inc. v. Boeing Co.*, No. 21-cv-896, 2022 WL 17904317, at *5 (W.D. Wash. Dec. 23, 2022). RealD’s Rule 33(d) response points to almost three thousand pages “where further delineation of trade secret categories #1–4 can be found.” Ex. 2 at 6. Microsoft “should not have to comb through plaintiffs’ [extensive] pleading and exhibits to determine what is being claimed as [a] trade secret,” especially when these pages almost certainly include “public information and other seemingly non-trade secret information.” *M.A. Mobile LTD v. Indian Inst. of Tech. Kharagpur*, No. 08-cv-2658, 2010 WL 3490209, at *5 (N.D. Cal. Sept. 3, 2020).

B. Discovery Responsive to RealD’s Allegations of Trade Secret Misappropriation Should Be Deferred Until RealD Identifies Its Alleged Trade Secrets

Despite having not yet identified its alleged trade secrets, RealD has now served written discovery on Microsoft consisting of 66 requests for production, 12 interrogatories, and five requests for admission. *See* Ex. 9; Ex. 10; Ex. 11. RealD should not be able to pursue a “fishing expedition” into Microsoft’s confidential information before crafting its trade secret claim. *BioD, LLC v. Amnio Tech., LLC*, No. 13-cv-1670, 2014 WL 3864658, at *5 (D. Ariz. Aug. 6, 2014).

The conundrum Microsoft faces manifests in the very first Request for Admission that RealD propounded on Microsoft: “Admit that one or more of the Accused Functionalities rely on use of an image recognition algorithm.” Ex. 11 at RFA No. 1. If Microsoft uses *any image recognition algorithm*—even one that it adopted from a public disclosure—that would fall within RealD’s category #1. Throughout RealD’s Requests for Production and Interrogatories directed

1 to the trade secret allegations, Microsoft faces the impossible task of meaningfully responding to
2 allegations that do not provide adequate notice and do not distinguish between the alleged trade
3 secrets and the prior art. Accordingly, the Court should grant a Protective Order deferring any
4 discovery as to the trade secret misappropriation allegations until RealD sufficiently identifies the
5 alleged trade secrets. In the absence of such relief, RealD will have succeeded in creating an
6 “improper advantage” by demanding discovery into Microsoft’s confidential information while
7 providing only “a general, non-technical description of [its] alleged trade secrets.” *Grellner v.*
8 *Raabe*, No. 15-cv-0189, 2017 WL 9486621, at *1–2 (E.D. Wash. June 20, 2017).

9 **V. CONCLUSION**

10 Microsoft respectfully requests that the Court enter an order compelling RealD to
11 sufficiently identify its trade secrets in response to Interrogatory No. 1 prior to any discovery of
12 Microsoft relating to the allegations of trade secret misappropriation.

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1 I certify that this memorandum contains 4,200 words, in compliance with the Local Civil Rules.

2 Date: March 3, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March 2023, I served the foregoing document via electronic means through the Court's Case Management/Electronic Case File (CM/ECF) system, which will send an automatic notification of filing to each party registered for electronic service.

SIGNED THIS 3rd day of March 2023 at Seattle, Washington.

CERTIFICATION OF COUNSEL

Consistent with Fed. R. Civ. P. 37(a)(1) and the local rules of this Court, counsel for Microsoft certify that they have in good faith conferred with RealD's attorneys in an effort to obtain the requested discovery without involving the Court. The parties, however, were unable to resolve the matter.

DATED: March 3, 2023.

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